IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIA HENRY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 22 CV 00125
	)	
BROWN UNIVERSITY, et al.,	)	
	)	July 24, 2023
Defendants.	)	9:48 a.m.

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES VIA VIDEOCONFERENCE:

For the Plaintiffs: ROCHE FREEDMAN, LLP
BY: MR. EDWARD J. NORMAND
99 Park Avenue, Suite 1910
New York, New York 10016
(646) 970-7513

GILBERT LITIGATORS & COUNSELORS
BY: MR. ROBERT D. GILBERT
MR. ROBERT RAYMAR
11 Broadway, Suite 615
New York, New York 10004
(646) 448-5269

Court Reporter: JUDITH A. WALSH, CSR, RDR, F/CRR
Official Court Reporter
219 South Dearborn Street, Suite 2342
Chicago, Illinois 60604
(312) 702-8865
judith_walsh@ilnd.uscourts.gov

APPEARANCES VIA VIDEOCONFERENCE (CONTINUED):

For Defendants:

Brown University:	MORGAN LEWIS & BOCKIUS, LLP BY: MR. JON R. ROELLKE 1111 Pennsylvania Avenue, NW Washington, DC 20004 (202) 739-5754
Columbia University:	SKADDEN ARPS SLATE MEAGHER & FLOM, LLP BY: MS. AMY L. VAN GELDER 155 North Wacker Drive, Suite 2700 Chicago, Illinois 60606 (312) 407-0903
Dartmouth College:	JENNER & BLOCK, LLP BY: MS. TERRI L. MASCHERIN 353 North Clark Street Chicago, Illinois 60654 (312) 222-9350
Georgetown University:	MAYER BROWN, LLP BY: MS. BRITT M. MILLER 71 South Wacker Drive Chicago, Illinois 60606 (312) 782-0600
Northwestern University:	SIDLEY AUSTIN LLP BY: MR. SCOTT D. STEIN One South Dearborn Street Chicago, Illinois 60603 (312) 853-7000
Yale University:	HOGAN LOVELLS US, LLP BY: MR. CHARLES A. LOUGHLIN 555 Thirteenth Street, NW Washington, DC 20004 (202) 637-5661

(Proceedings heard via videoconference:)

THE CLERK: Case 22 C 125, Henry versus Brown University.

THE COURT: Can I get a thumbs-up if people can hear me?

Okay. Good. Melissa, I think we're good to go here, but I'm not hearing you.

THE CLERK: Judge, I called the case already.

(Pause.)

THE COURT: Melissa, I'm not hearing you. And everybody seems to be hearing me, but I'm not hearing you. Let me just do an adjustment here.

All right. Melissa, can you say something so I can figure out if I can hear you now?

THE CLERK: Can you hear me now, Judge?

THE COURT: I can hear you now. Okay. All right. Good morning. Sorry for that glitch on my part.

This is Judge Kennelly. I'm going to ask anybody who's not talking to mute yourself. This is particularly the case for people who are on the phone. And I am looking at the list right now, and there are at least two people on the phone who have not muted themselves -- actually, three.

So I am going to wait a couple seconds for you to do that until I see the little mute sign show up so we don't have any problems like we've had in the past. And then what's

going to happen is if those people haven't muted themselves, I'm simply going to kick them out.

Down to one. Okay. Everybody's muted themselves.

I assume that counsel have given a list to my courtroom deputy clerk.

Can plaintiffs' counsel please give your names for the record if you're planning to speak.

MR. NORMAND: Your Honor, it's Ted Normand for the plaintiffs. My colleagues Robert Raymar and Robert Gilbert might also speak depending on what issues arise.

THE COURT: Okay. Defense counsel?

MS. MILLER: Your Honor, Britt Miller on behalf of Georgetown University. We submitted a full list to your court reporter and to your courtroom deputy.

THE COURT: Okay. I see one other person with a video on. It's a young lady with a black jacket.

MS. VAN GELDER: Yes. Good morning, your Honor. It's Amy Van Gelder. I'm for Columbia. I can turn my video off.

THE COURT: Okay. So preface-wise, going forward, I'm going to change some procedures here. This is going to be the last one we do by video or phone. Everything else, we're going to do in person. And I'm going to treat this like it was an MDL because it's roughly the same size or scope of an antitrust MDL.

We're going to have a -- we're going to have an in-person status hearing every six weeks. I'm going to set a deadline. Anything that anybody -- I'm going to require status reports before that, but any motion that anybody wants to have heard is going to be due ten days before the status hearing, and the response will be due three days before the status hearing. And if that schedule isn't met for a motion, you'll wait until the next one to get it done unless there's a true emergency which has a very narrow and limited definition.

We'll do it like I do in most MDLs. We'll have a call-in number so people can listen, but that will be listen-only. If you want to talk, you're going to have to be in the room. And I know there's a lot of lawyers in the case, but that's the way we're going to do it going forward.

So it looks like aside from a few odds and ends in the status report, most of which aren't really matters of controversy, there's really two things before me today, and that's the motion that's entitled "Motion for reconsideration" that was filed by the plaintiffs. That's docket No. 387.

And then the other one is the motion that's entitled "Motion to compel and for sanctions against Georgetown." That's docket No. 402. There's been a response to the latter motion. There's been a response and a reply on the first one, so I want to start on the first one.

And a lot of the ink has been spilled by both sides

on the, quote, unquote, motion to reconsider about whether reconsideration -- about the procedures and the rules around motions to reconsider. So I just want to start off by saying, I'm not going to deal with any of that stuff.

So first of all, everything that we're talking about here in terms of the prior orders that I've made, the prior rulings that I've made, they're all interlocutory. None of them have the equivalent of, are the equivalent of some sort of holy writ. That's going to -- that applies to both sides in this case.

If there's been -- you know, it's perfectly okay, I don't want people to be doing this willy-nilly, and I certainly wouldn't change a ruling willy-nilly but if I -- if I did something that's wrong or I did something that later developments have shown is wrong or should be modified, then it's perfectly appropriate. So I'm just going to completely bypass, and I don't want to spend a nanosecond of time today other than what I've already spent on the issues about procedural appropriateness or not.

So let me just make a couple comments. Here's what I thought as it relates to what I'll just call redaction of names. And I'm using the word "names" to include both student names and donor names. I thought we had developed this mechanism relating to the FERPA issue -- which for the benefit of the court reporter, that's F-E-R-P-A, all capitals -- that

would allow at least for now bypassing the potential need to notify persons named in educational records of their impending production.

And my recollection and understanding was that there had been a mechanism developed whereby the name of the student or applicant would be replaced by what was referred to as a unique identifier, in other words, something specific to that person, and that would -- and that that particular student or applicant would be identified by the exact same identifier in every time they get -- their name gets redacted so that they could be compared across different documents; and, and if there was a donor, a parent, or some other person related to the student who appeared in a record in a way that if you named the other person but not the student, it would allow identification of the student -- you would be able to figure out who it was, in other words -- that that person, the donor, parent, or other person or whoever they are would also be given a unique identifier that would allow that person to be matched not just with themselves across records but with the particular student to which they relate.

So that's what I thought we had. Am I right about that? I'm going to ask the plaintiff first and then defendant second. And what I want is, to start off with, that's a yes or no question. I want a one-word answer: Am I right or am I not right?

MR. RAYMAR: No, you're not right --

THE COURT: That was Mr. Raymar.

MR. RAYMAR: -- in that sense --

THE COURT: That was Mr. Raymar.

MR. RAYMAR: No.

THE COURT: You said no.

What do the defendants think?

MR. LOUGHLIN: Your Honor, this is Charles Loughlin on behalf of Yale. I believe you're correct. That is what the UIDs do.

THE COURT: Okay. So let me go back to Mr. Raymar and tell me why you think my rendition is wrong.

MR. RAYMAR: There was a procedure to establish UIDs for students and applicants. There was no procedure to establish UIDs for donors or parents because in the confidentiality order, we worked off the October 26th rulings that essentially said donor names are not education records. So --

THE COURT: Pause for a second. Pause for a second.

Okay. So your belief was that donors weren't going to get -- donors or parents or whoever they are, their names weren't going to get redacted, period, full stop, right? That was your understanding?

MR. RAYMAR: Full stop, yes, correct.

THE COURT: Okay. But then it sounds like -- and we

can argue about whether your understanding is right or not. Defendants think it's not, but that's your understanding or that's what you say your understanding was.

If I am understanding the current state of affairs correctly, what you're telling me is that that hasn't happened as it relates to donors, slash, parents. In other words, they've just been blacked out, and there's no way that you can compare them to -- or that you can match them up with a particular student.

Am I understanding you right?

MR. RAYMAR: Yes.

THE COURT: Okay. So one -- okay. So let me -- who was that talking? That was Mr. Loughlin talking before. It doesn't have to be Mr. Loughlin that deals with this point. It can be anybody, obviously.

But I guess from just kind of a common sense standpoint if you define the universe of common sense to include knowledge of this case, it would be a pretty odd situation in which there wouldn't be a way to match a donor, a parent, or somebody else who is referred to in a record that's subject to production with the particular student or applicant to whom they are related, and I don't mean "relation" to mean just blood relations. Right?

MR. LOUGHLIN: You're correct, your Honor. The UID for a given student and that student's parents, for example,

are the same UID so that --

THE COURT: In other words, if I -- let's say my kid applies to a school, and they're given UID 1234. And then I'm a donor, and I'm referred to in a record, I'm identified as 1234 as well?

MR. LOUGHLIN: Correct.

THE COURT: Okay.

MR. STEIN: Your Honor, this is Scott Stein from Northwestern. May I clarify?

THE COURT: Okay.

MR. STEIN: With respect, I actually believe what your Honor described is correct. We did not apply --

THE COURT: Which thing that I described?

MR. STEIN: The -- well, sorry. Let me clarify. I agree with Mr. Raymar. In other words, I think what you described is correct. We did not apply UIDs to donor names.

However, all the records I'm aware of that we've produced where donor names are redacted, it's in conjunction with a particular student. In other words, we didn't produce standalone donor records. So for Northwestern, attached to the motion were examples of these tracking lists --

THE COURT: Right.

MR. STEIN: -- which show particular applicants.

So where we had a UID for the student -- again, those were generated from structured admissions and financial aid

data -- we applied the UID. If the name of the potential donor was related to the student, we redacted that. Now, there would not be a separate UID applied there, but it's apparent from the document, you know, it's a line talking about this applicant, this UID, and we redacted the parent's name. So it's not some freestanding name of the donor.

Likewise, there is --

THE COURT: In the stuff that's filed, is there a particular exhibit you can point me to so I can just kind of -- I've read all this stuff, obviously. This is just so I can kind of eyeball it as you're talking about it.

MR. STEIN: Yes. If you...

THE COURT: I'll give you a second. That's fine.

MR. STEIN: It will just take me a second.

(Pause.)

MR. STEIN: I'm looking at, it's docket 355. I just have to find --

THE COURT: Oh, this isn't part of the current briefing then? This is earlier stuff?

MR. STEIN: Right. I believe the exhibits to the -- the exhibits to the motion for reconsideration are focused on other defendants.

THE COURT: Okay. Hang on a second. I'm just, let me -- I'm just pulling up the docket here so I can go find 355.

All right. I'm at 355. Which exhibit should I be looking at?

MR. STEIN: 3.

THE COURT: Well, they're A, B, C, so that means, that means C or does that mean D? Is it tab 3, I guess is what I'm asking.

MR. STEIN: It's tab B.

THE COURT: Tab B. Okay. All right. So this is docket number -- just so everybody knows what I'm looking at, I'm looking at docket No. 355-3. And give me just a second here.

Okay. So I'm looking at -- okay. So it's a spreadsheet, basically.

MR. STEIN: It's a spreadsheet. And --

THE COURT: So column one which is blacked out would have, it says last name, first name. That presumably is the name of the student.

MR. STEIN: Correct.

THE COURT: And then the second --

MR. STEIN: There are not UIDs for this particular student because we don't have structured admissions data going back beyond 2007-2008.

THE COURT: This is pre 2' -- oh, this is 2005.

MR. STEIN: Right. But we produced versions of these, you know, that do have UIDs.

THE COURT: So let me just, just so that the record is clear, so the first column says last name, first name. That's blocked out. The second column says "interested party." That's not blocked out for some of them and it is for others. Then it says, then there's a, something that characterizes their degree of interest.

Then there's something that characterizes their affiliation, and that might be their title. It might be donor. It might be trustee. It might be whatever. There's another column about application type, and there's a column of comments which has some stuff blocked out.

So if I wanted to, on the first column of that, on the first line, if I wanted to know what student that relates to, you're saying that this was produced in conjunction with other documents that it would make that clear. Is that what -- did I get that right?

MR. STEIN: No. No, you would not be able to tell who the student is, but the purpose of having a -- without unredacting it, that would -- that presents a FERPA issue. For older documents where there's not structured data because the UID -- let me back up for a second.

Recall that the goal of the UID process was to come up with a common identifier that could be used to identify the same student across the records of all the institutions. The only way to do that is through structured data, right, so it

could be done by computer.

THE COURT: Okay.

MR. STEIN: So the ability to have a UID necessarily depends on how far back your structured data goes. And most schools don't maintain admissions data, you know, forever. So this document is not representative of, you know, let's say, the last 15 years, but where we could identify a student from the admissions data, we would have applied and did for other documents apply a UID.

Now, for the first line, you can see that the name of the individual, it says "son of blank," right. So blank is redacted because necessarily if you can tell who they're the son of --

THE COURT: Yeah, right.

MR. STEIN: So we wouldn't have applied a separate UID to that "son of blank," but you can tell from the document, you know, it's referring to that student on that line.

THE COURT: But you don't know who the student is because it's been blacked out.

MR. STEIN: Correct.

THE COURT: Okay. So if I'm a lawyer in the case on the plaintiffs' side and I want to try to figure out -- and the first line is probably not the best one because it doesn't seem like there's a financial thing. There's one further down

the page. Let's say the initials of the interested party are JR. That's a donor.

Okay. If you want to figure out the extent to which financial considerations played an impact in the admission of the particular student, how would you do that because you don't know who the student is.

MR. STEIN: Correct, but as your Honor explained, you know, when we litigated this previously, plaintiffs have the ability to ask questions about how was this type of information used, was it considered as part of the admissions process to try to get at some of the policies and practices.

Somebody sitting there is not going to be able to necessarily address a particular issue but again, given the limited nature of the inquiry here which is, did we consider -- did the defendants consider the financial circumstances of the student or the student's family, and that being a binary inquiry, you know, that applies to all schools, your Honor recommended --

THE COURT: Does everybody on the defense side agree that's a binary inquiry? There's no gradations, it's yes/no? Yes, you lose; no, you win?

I've got like 20 defendants, right. Do I ask for a show of hands at this point?

Anyway, continue with your point.

MR. STEIN: Yeah, and to be fair, your Honor, that's

our understanding of your order in the motion to dismiss which means --

THE COURT: Yeah. Okay. Fine. Go ahead.

MR. STEIN: And that that would be -- and then if the plaintiffs can establish that that's not sufficient, they would be able to get more. Now, we think -- we don't believe that when the time comes for plaintiffs to make that showing at least as to Northwestern they will be able to do that.

I would also note one other point, your Honor, which is if you recall, there are a number of different vectors for unique blindness. There's transfers, wait lists. This issue isn't some sense of sideshow because there has been testimony elicited clearly on the record from a number of schools that were not -- that said they were made aware of wait lists or transfers or the like.

So we are in some sense beating a dead horse here but as -- you know, that is a separate --

THE COURT: I haven't seen any offers of judgment getting filed yet, though.

MR. STEIN: Well, yeah, it's not a judgment but it does, we think, frankly, go to the whole proportionality question here.

THE COURT: Okay. Okay. All right.

So let me go back to Mr. Raymar then. Why don't you tell me what's wrong with what I'm hearing here from the

defense.

MR. RAYMAR: There's a lot wrong. First of all, in Section 8 of the confidentiality order, there's a requirement of UIDs for all student names who are redacted. There's no --

THE COURT: It was a little glitched. Can you repeat that sentence? There was a requirement in Section 8 --

MR. RAYMAR: There is a requirement of UIDs for all students and applicants and not simply those who end up in the structured data. So it's perfectly possible for Northwestern and Yale against whom we originally brought the motion to insert UIDs for students who do not appear in structured data.

Secondly, Mr. Stein repeated the --

THE COURT: Can you pause right there for a second? Remember your other points but pause right there.

And, therefore, what? What's bad about that? In other words, the fact that there -- the UIDs apply to anybody whether they're in the structured data or not, what difference does that make? What difference does that make to me?

MR. RAYMAR: Without a UID or a name, we can't ask anyone, was this person admitted because the statute requires not (inaudible) -- typically consideration but impact on admission. And we can't ask any questions of, what were the circumstances regarding the donor? What did the donor ask for? What did the donor pledge? What was asked of the donor? Did the donor increase a donation by virtue of a conversation

with whomever put the student on this list or in what other defendants have produced which is a presidents list?

It's now proposed that we're going to get a presidents list, there may be 100 or 200 students, to the admissions office, "Please admit these kids." And we won't know who the kids are, and we won't know who the donors are.

And we've already had four depositions, two from Dartmouth, one from Northwestern, one from Georgetown where your Honor's hypothetical "how the heck am I supposed to answer this question" manifested itself.

We need the circumstances of the donation. We can't try this case on assumptions. Mr. Stein for the first time now says at least in Northwestern's case, we should assume that the name of the donor was related to a family member in the applicant.

Your Honor would laugh us out of court if we tried to prove the case based on assumption. Not only has there been no offer of judgment, there's been no offer of stipulations.

THE COURT: Okay. So just picking up on that point, one of the things that was said a moment ago -- and it's not the first time it's been said. I think I've heard this in prior conferences that, I don't know if it's all, but a bunch of the schools have essentially conceded that they are not financial circumstances blind as it relates to transfer students, and there was one other category.

Let's just take that as a given. Let's just say that's true for at least one college. If it were true for a particular college, would you need more as to that college and, if so, why? In other words, the college -- the college concedes, "We consider financial circumstances when it relates to transfer students."

MR. RAYMAR: I'll answer your Honor's question first --

THE COURT: Go ahead.

MR. RAYMAR: -- and hope to make a second point.

We would still need the data because this is a conspiracy case in which if one university blows the exemption standard under the statute, it's blown for all the co-conspirators. And so we need more than a de minimus of proof that they considered the financial circumstances of applicants they admitted, not simply considered financial circumstances, but the kid was admitted.

THE COURT: So what you're telling me here is or at least part of what you're telling me here is that given what you've gotten in redactions and even taking into account the unique identifiers, you're not always able to tell whether the particular student was actually admitted that's referenced in some other documents?

MR. RAYMAR: That's correct. That's correct. And without unique identifiers, we can't go to the structured data

to find either the qualifications of the student -- because we want to be able to prove that this student was less qualified and got admitted by virtue of the donation -- or that the student was admitted.

THE COURT: Okay.

MR. STEIN: Your Honor, may I respond to that point briefly?

THE COURT: Give me just a second because I want to finish, process.

Yes, go ahead.

MR. STEIN: So a couple of things. First of all, the confidentiality order expressly applies -- provides that UIDs will be generated from structured data. There's no other way to do it. You'd otherwise have to have a team of people sitting down --

THE COURT: Coming up with numbers.

MR. STEIN: -- right, and then matching them to other schools. It's impossible to do it otherwise.

And the plaintiffs here are focusing on the exception rather than the rule, right. There's a reason they attach documents from 2005 and 2004. Those are old. We produced 15 years of things that are replete with UIDs, and you can take those UIDs -- if there's a UID, there is structured data.

They can take our documents, everyone with a UID, go to the structured data, see exactly what happened with that

student, see the academic information they requested from that student, see the financial aid for that student. They can do that with every single one of those, and there's not been any argument to the contrary.

And, you know, again, I'm not sure I understand the point about the response to the question about transfers. Again, if Northwestern says we would need an order for transfers, I'm hard pressed as to how that means they need even more data about donors for Northwestern let alone for any other school. And, you know, if they want to propose some stipulation, we could certainly consider that, but this "boil the ocean" approach with donor information --

THE COURT: So you're the person who came up with the "boil the ocean" metaphor?

MR. STEIN: Yes.

THE COURT: I just wondered who it was.

MR. STEIN: I couldn't use the sun, the moon, and the stars. I had to find a different element, but yes. You know, we --

THE COURT: That's kind of the opposite of the metaphor "draining Lake Michigan with a spoon"?

MR. STEIN: Right. But, you know --

THE COURT: I've heard that one before too.

MR. STEIN: These tracking lists, again, Northwestern, for example, you can see information in there.

And this was elicited at Mr. -- at former President Strotz's deposition. You can see information in there about giving levels, about potential donor capacity. It's all -- you know, it's all in these documents.

Now, again, they have not put that in the motion before you, and that's why we're loath to have this decided in this context because your Honor had set forth a process where if they could come forward and show, you know, based on documents and deposition testimony that they need more, they would get it, but I don't think they can.

And I'm concerned about this being decided on this, you know, potentially incomplete record. Plaintiffs have done what you suggested they do, which was take the deposition of Northwestern of its former president. And we believe if your Honor -- we don't believe they can make that showing.

THE COURT: You were about to say if I were to read the deposition.

MR. STEIN: We are welcome --

THE COURT: Yeah, I -- how many pages is it? 450? I don't think so.

MR. STEIN: It's 200.

MR. GILBERT: I'll interject because I actually took the deposition.

THE COURT: I can't hear you. I mean, I can hear that there's somebody talking, but I can't hear what you're

saying.

Now you're muted.

You're muted, Mr. Gilbert.

MR. GILBERT: I'll try again. This is Robert Gilbert.

THE COURT: Yeah, but your mike is turned on, like, mouse level, and I mean a physical mouse, not a computer mouse. So either crank it up or yell or get closer to it.

MR. GILBERT: Sorry, your Honor. I'm trying my best here.

Is that better?

THE COURT: Slightly.

MR. GILBERT: Is that better?

THE COURT: That's better.

MR. GILBERT: Okay. Sorry. All right. I'm sorry. This is Robert Gilbert, if I may interject just briefly.

I was the person who took the deposition of the president of Northwestern, and many times or at least several times he said pretty much what your Honor anticipated: "How the heck should I know? I don't know who this person is." So that's what we encountered when we took the deposition of Morton Schapiro.

THE COURT: I think, though, what I think I'm hearing at least in part from the defendants is that what's the -- there's no significant gain to having that issue hashed out on

a granular level. In other words, and you're looking at that undue burden and proportionality or whatever, you know. Fighting that out on a -- or figuring that out on an individual-by-individual basis may have some benefit to it from the plaintiffs, but at least in the context we're talking about now, what I'm hearing from the defendants is it imposes a very significant burden in terms of this whole redaction process or unredaction process.

And the benefit on the other side is not significant in comparison with the other data that you already have which is this structured data that at least if it's -- you know, I'm going to -- I'm going to single somebody out here. Mr. Raymar, would you stop freaking shaking your head when other people are talking? It is really distracting. It's really distracting when you're in a courtroom, and it's even more distracting when you're on a video, so cut it out.

And now I have lost my train of thought. Just answer right where I said, Mr. Gilbert, or whoever.

MR. RAYMAR: May I address that, your Honor?

THE COURT: This is one of the reasons why we're not doing any more videos or phone calls because when I have somebody in the courtroom and they start doing crap like that, I can just put them in the penalty box and tell them they don't get to talk anymore, and that's exactly what's going to happen.

MR. RAYMAR: Might I address that, your Honor?

THE COURT: I don't know. See if you can.

MR. RAYMAR: The statute requires the order to break through the 568 exemption that we showed at a university or the conspiracy with regard to the financial terms of (inaudible) -- different universities including Northwestern have waived the 568 defense, but they have not stipulated that the -- they or their colleague universities were admitting students without -- with regard to financial circumstances.

Yes, there are some individual questions on which they said on the wait list or transfer, "we were made aware." There are some examples in the exhibits.

Mr. Stein called to your attention where it could be inferred that a donation had something to do with the admission of a related family member, but we can't try the case on assumptions and inferences. That's why without stipulations, we still have a case to prove.

Yes, we have months left to prove it, but as we take all these depositions and we get the answers your Honor anticipated that, "I can't tell. I can't answer the question. I don't know who the heck the person was. I can't tell you that this student would not have been admitted without the donation." We need to prove that absent stipulations.

And although Mr. Stein correctly says there are inferences here, there's circumstantial evidence there, there

perhaps was need awareness on wait list at some schools, there perhaps was need awareness on transfers at some schools, we don't have stipulations. We still have to try to prove our case.

And when you look through each of the entries even on the two Northwestern exhibits in our original motion, we can't not only ask the witness, the admissions director or the president, was this person admitted on account of a donation. We can't get into the circumstances. We can't even ask Mr. Schapiro, "Well, what were the discussions that led to putting this person on your presidents list" because he doesn't know who the person is.

So he can't tell us the circumstances. And without telling us the circumstances, he can't tell us that it was a donation that breaches the 568 exemption in this case for Northwestern.

THE COURT: Okay. So the specific remedy, specific remedy that you are asking me for on this particular motion is what exactly?

MR. RAYMAR: We asked for the names of the donors.

THE COURT: Which donors? Every donor? Donors that are named on the -- that's what "specifically" means. Just donors that are named on these presidents lists? What?

MR. RAYMAR: With regard to that student (inaudible) --

THE COURT: You want me to -- you want me to enter an order, right? You want me to enter an order?

MR. RAYMAR: Yes.

THE COURT: And the order is supposed to say what on this? I mean, I can't enter an order saying, okay, disclose it with this -- on this particular student. That's a meaningless order.

So what's the relief? What's the order supposed to say that you want me to make?

MR. RAYMAR: Donor names are not to be redacted, number one. Number --

THE COURT: Okay. So pause -- okay. That's number one, donor names are not to be redacted. What's number two?

MR. RAYMAR: Number two, for students who don't have UIDs, create UIDs.

THE COURT: Okay. Is there a number three, or is that it?

MR. RAYMAR: There is number three. I have to look it up, your Honor.

I'll stick with that.

THE COURT: Okay. So on the second part of that, students without UIDs, is that -- is that just -- is that -- as a category of people, does that just tend to be the older records before all of this stuff was computerized, or is it more than that?

MR. RAYMAR: I can't honestly answer that question. I don't know. I know that a lot of the documents we were given had no UIDs including the Northwestern documents. They say it's because they're the older documents. I don't doubt Mr. Stein, but I don't know.

THE COURT: All right. So let me ask you then on number one, don't redact donor names. Let me ask this very specific question. So it's a hypothetical. So let's say you've got an email, an email from, you know, the president of University X to the admissions director saying, "I received a call from donor Matthew Kennelly who gives a million dollars a year, and he asked that we admit his grandson to our university. Please do this."

Okay. Now, if you don't redact my name from that record, you know who the student is. So that's -- you're in effect identifying the student when you identify me. This would be true for many, perhaps most, maybe not all, records like that. Identifying the donor is going to identify the student, and they're likely going to be identified in the same record.

So it would seem to me that that, before that happens, there would have to be under FERPA notice given to the student saying, "We're about to disclose your records."

Mr. Raymar's picture just disappeared.

Okay. It came back.

All right. So what about that? So what about that?

MR. RAYMAR: Right. The (inaudible) -- the type of records that Mr. Stein referred to and that we have been referring to is, in fact, an education record.

There's a distinction between the donation record and an education record in the confidentiality order. And under both the regulations and the guidance from the Department of Education, these are not education records. If they're not education records, you don't have to worry about identifying the student.

If the CFR wanted to say, if the Department wanted to say that every time a student's name is identified, that's an education record that has to be redacted or notice given, they could have said that. It did not say that.

THE COURT: So stop. I am looking at, I forget which title, 34 CFR 99.3. That's the definition section. "Education records, (a): The term means those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution."

So right there, the thing that I just described qualifies because it's a record, it's directly related to the student, and it's maintained by the university.

MR. RAYMAR: May I respectfully disagree because the donor --

THE COURT: Okay. Is there a word that's missing from the regulation?

MR. RAYMAR: Yes. It's about the donor, the donor's history of donation, his ties to Northwestern, the amount of his --

THE COURT: Stop. So don't change my hypothetical. My hypothetical says it's an email from the president to the director of admissions saying, "I got -- I was contacted by Matthew Kennelly who gives a million dollars a year, and he wants us to admit his grandson X who's an applicant."

And let's say the admissions director then checks off the file and that person, and the grandson gets admitted, so now the grandson is a student. How is this not a record that's directly related to a student? That's the --

MR. RAYMAR: Not --

THE COURT: Those are the words in the regulation: "This term means those records that are directly related to a student."

MR. RAYMAR: We disagree with that, your Honor.

THE COURT: Well, how can you? I mean, it's the English language, for God's sake.

MR. RAYMAR: Because we quoted the guidance in the reply memorandum about what is an education record, and it talks about student academic performance, about disciplinary proceedings, about his curriculum, about the papers he wrote.

It's not that the grandfather wants to make a million dollar donation so that his daughter can be admitted. The focus there is not on the student. The focus is on the donor.

And what we see in these donation records again and again is these 16 remaining universities building relationships with donors, building their endowments, seeing how much they could get -- I read you the numbers as to Yale on May 31st -- in order to get a preferential treatment of the student. The focus is on the donor, not on the academic credentials or the disciplinary record or the record at a university or high school of the student.

THE COURT: I have to tell you, I don't understand how you, or if it's the agency, how the agency is getting from the regulation that is published in the CFR to what you just said. The term "record" is defined in the same regulation. It means any information recorded in any way, dot, dot, dot. Education record means a record, so in other words, any information recorded in any way that directly relates to a student.

MR. RAYMAR: I'm looking for the guidance.

THE COURT: Guidance -- I mean, I don't want to say this. Guidance, schmidance. It's a regulation, for God's sake.

MR. RAYMAR: Your Honor, it's not a regulation. It says every name of the student makes it an education record.

That's why in the confidentiality order there was a distinction drawn between education records and donation records.

THE COURT: That's -- but, see, this is why I gave you the hypothetical that I did because I wanted to have it deal with something like what we're talking about here.

I completely agree that you -- if you've got a list of the donors of the university, those aren't education records. They're not. They're not education records, no way. The hypothetical that I gave you -- I mean, it wasn't just pulled out of the air, for God's sake. I made it up for a reason. It's a record that includes the name of a donor and relates it to a particular student so that if you disclose the name of the donor and black out the name of the student, you know who the student is.

MR. RAYMAR: I hear you. I found the reference I was looking for, and that is, includes -- an education record, quote, includes student-related data such as grades, transcripts, class lists, student course schedules, health records, student financial information, student disciplinary files. That's on Page 6 of our brief.

It's not my grandfather --

THE COURT: Keep going. Did you read me the whole thing, the "such as"? Are applications included in there?

MR. RAYMAR: I don't know. I --

THE COURT: You have it in front of you. You're reading from it.

MR. RAYMAR: No, I'm reading from my brief. I can't get on two sites at the same time. I don't think so, and I don't -- can't answer your question more than that.

There's a second point, your Honor. We're not boiling an ocean anymore. We've -- we've distilled this to the applicants whose family member made a substantial contribution with the understanding or the anticipation that it would impact the admission of the student. That is a limited set of student names.

If they need to give FERPA notice, that's not burdensome. The notice requirements are not burdensome. It's the last known email address. And there's even the notice that has to be given attached to the FERPA order your Honor entered. It's not burdensome.

If they have to give notice, your Honor disagrees with me, fine, or the university disagrees, that's fine, let them give the notice to that limited set of students. But without it, we can't prove -- they're going to come up and say --

THE COURT: I get -- I get -- I completely understand the evidentiary proof issue. I completely understand the proof issue. You don't have to keep repeating that part of it. I completely understand the proof issue.

What I'm trying to get a handle on --

MR. RAYMAR: May I --

THE COURT: No, you may not. You've said pretty much everything. You've talked more than me during this hearing, so you're going to be done after I finish saying what I'm saying.

And you interrupted me again, and I lost my train of thought, so now I've got to look at the transcript to try to figure it out. Sorry.

I completely understand the proof issue. What I'm trying to get a handle on is the following, that the defendants are saying that in terms of trying to decide burden and proportionality, they're saying that this is a relatively minor point that would impose a significant burden, okay, and that I ought to rule their way on the proportionality or undue burden issues which is two sides of the same coin. That's what I'm trying to get a handle on.

So I want to have somebody on the defense side who is willing to be the spokesman for everybody, spokesperson for everybody, give me the counterpoint to what Mr. Raymar has been saying.

MS. MASCHERIN: Your Honor, this is Terri Mascherin on behalf of Dartmouth. I'm happy to speak to this since Dartmouth's name was mentioned a little bit ago.

It is a significant burden, your Honor, and the

burden does -- it is disproportionate. Just by way of example, we put forth a witness last week who gave testimony to the effect that each year in certain admissions decisions, candidates who were on the fence, if you will, would be admitted because of the interest of the alumni affairs and development office.

We have also, we -- unlike Northwestern, we have structured data that goes back two decades. We've produced student admissions, structured data going back to the early 2000s. We've generated UIDs for all those students.

The UIDs have been inserted into all of the priority lists that we've produced which are ample in number and, therefore, the combination of deposition testimony that is being elicited and plaintiffs' ability to match the UIDs from those priority lists to the admissions records do allow plaintiff to discern evidence to show that information that was contained on those lists was, in fact, taken into consideration in the admissions decision. And they can see from their admissions structured data what those decisions were.

And, in fact, in the first deposition of a Dartmouth employee that was taken in this case, the questioning lawyer, in fact, commented that his associate had run the UIDs against the structured data and that -- I believe the number was 14 of the however many were on that list had, in fact, been

admitted. So the -- in comparison, your Honor, from my client we're talking about records going back a couple of decades and a substantially large number of notice, notices that would have to be given out.

So this is not a "one size fits all," but I wholeheartedly agree with Mr. Stein's articulation earlier that plaintiffs have, through the wide range of discovery available to them, the ability to flip the switch with respect to whether the exemption does or does not apply to the group.

And to be clear, Dartmouth is one of the schools that is not asserting the exemption and that this burden would be disproportionate.

THE COURT: You responded -- this is a distillation of some of the points that Mr. Raymar raised and Mr. Gilbert were making.

We get that there's at least some indication out there that at least some of the universities considered financial circumstances in at least some situations. A, nobody has stipulated to that yet and, B, we don't want to prove our case by 50.1 percent to 49.9 percent. Nobody does. We want to prove our case way more than that.

And so it's not enough to have these, you know, many not even admissions here in the next place, we want to be able to put the whole package together. And in doing that, the fact that we, you know, can pull a bit or piece from here or

there really doesn't do the -- do it for us.

We need to be able to ask actual witnesses actual questions about actual information that's been produced to us, and we're being hamstrung in doing that because of all of the blackouts that are happening pursuant to, I guess, the protective order because when we stick the thing in front of the witness, the witness says, "I have no idea what this is about, so I can't really comment on it."

What about that, all of that?

MS. MASCHERIN: Your Honor, in the deposition, when the UIDs are present in the document, the plaintiffs can tell who on the list was admitted and who was not admitted. The plaintiffs can also tell from many of these documents produced by many of the defendants what the specific information was that was given. As Mr. Stein noted, what's the parent's giving history? What's the assessed giving potential of this particular interested donor, etcetera?

And so there is ample evidence, your Honor, from which the plaintiffs can make their case. They don't need -- I submit they don't need to know who a particular parent or grandparent is who was mentioned in the record whose name is redacted under FERPA to know that this student was -- for example, was admitted; that this student had certain academic credentials; where that puts the student in the spectrum of the students who applied in that cycle; and the fact that the

dean of admissions was provided with information about either the giving potential of the family or the family's longstanding legacy relationship or contributions to the alumni body, any of those things. And that, your Honor--

THE COURT: Yeah, but what if the dean of admissions then testifies in their deposition when asked, "Well, did you take any of that into account" says, "I don't know because I don't know who you're talking about here."

You can't tell me that's not going to happen or that it hasn't happened. It has.

MS. MASCHERIN: I -- I don't deny that that --

THE COURT: I mean, in other words, A gives B all of this, you know, financial -- financial need-related information or financial, whatever we're calling it, financial circumstances-related information. A gives it to B, but the question is whether it got considered or not.

I get stuff all the time that I don't consider. Okay. It's given to me, but I don't consider it because it's not relevant. It doesn't make a difference. It's a tiny factor in the overall scheme of things or whatever.

And it's not enough, it would seem to me, for the plaintiffs to be able to show all this information was provided, it was put out there that this person had this very wealthy -- this very wealthy parent who we might be able to set up as a donor or this person has a wealthy grandparent who

already is a donor or whatever.

That's all well and good, but if they can't -- at least on some of it, if they can't make the match on whether that got taken into account which likely involves asking some person a question that the person can answer, then what good is it?

MS. MASCHERIN: Your Honor, speaking just for the records that I am most familiar with in this case, typically the records have -- the records include an initial decision by the admissions department, information provided from alumni affairs and development with respect to a limited number of applicants, and then a final admissions decision.

In fact, for many years, there are reports that show initial decision, final decision. So it's quite evident how the decisions changed as a result of the meeting and --

MR. STEIN: Your Honor --

MS. MASCHERIN: -- they don't need to know the individual identities of the students and their parents to see that it happened. And once there is that evidence then we get to, you now, emptying Lake Michigan or boiling the ocean or whatever metaphor you would like to apply.

MR. STEIN: And, your Honor, all of those questions you described are all great questions that I was shocked were not asked at Morty Schapiro's deposition. I don't know why they didn't. They didn't. That's one of the reasons -- I

would be happy to have you review that deposition as part of the analysis about whether more is needed here.

You know, plaintiffs come in with this table pounding about selling admissions. It's ridiculous. But then they have the person that they've made the poster child for this, Northwestern in the deposition. They don't ask him those questions. They don't ask him. How was this information considered? They said what does this column mean, what does that column mean. They didn't ask him.

So then to come in and say, turn out their pockets and say, "Oh, we need more," they didn't even do the very basic kinds of things that your Honor suggested.

And, sure, he can't tell who the name is behind a particular line, but why is that necessary? You can easily ask, how was this information considered? Did you consider it?

THE COURT: Okay. I have to bring this to a close here. So here's where I think we are. So a couple of things. So number one, I'm not backtracking on what I said before in the prior hearings about a donor record is not an education record, but I want to be clear on what I meant by that.

What I didn't mean by that, that's the best way to define it for this purpose, is when a record -- Mr. Raymar just went the other way. I want to make sure he's listening.

MR. RAYMAR: I can walk and talk.

THE COURT: What I didn't mean by that is that when a record discloses something about a donor and also discloses a relationship between that donor and somebody who has ended up as a student, whether they were an applicant at the time or a student at the time or whatever, I didn't mean that that's not an education record.

As far as your reading of the regulation, the regulation is -- seems to me to be pretty clear on its face. And I will just comment on this guidance. And if you had been able to pull it up for me or show it to me, I could have commented on it further.

You know, the laundry list of items in there was "such as." That's by definition nonexclusive. Okay. And so I -- it just seems to me that a record that says, "Donor X called about -- contacted us about their child, applicant Y" and applicant Y ends up being a student that under the plain language of the definition in the -- in Section 99.3 of Title 34 of the Code of Federal Regulations, that qualifies as an education record, and the name constitutes personally identifiable information, whatever the lingo is.

So that's kind of my thinking about all of that. Now, is that -- is that a holy writ either? Of course, it's not a holy writ. I haven't had the -- to the extent I had to deal with it in a 12(b)(6) motion which, by the way, I point out, that's not the final judgment in the case either, but

whatever. You know, it's not a holy writ. It's subject to modification if I get a brief later on that convinces me otherwise, but that's kind of where I sit right now.

And so I'm not prepared at this point to start telling people to -- we're chucking the redaction scheme out the window and do the two things that Mr. Raymar said is, don't redact donor names and for students without UIDs, create UIDs.

On the latter point, it just seems to me that that would involve a significant burden. I'm not at the moment persuaded that it's proportional. And on the donor names thing if, in the types of records I'm talking about, it seems to me that it's appropriate to redact them unless -- and here's where we're going to get to the rest of it, unless there's going to be a FERPA disclosure made. Okay. But I'm not prepared to do that in gross either.

And one of the things I think I have to be cognizant of is that this motion relates to two schools, but I've got however many, 15 or however many I've got here. And anything I say is going to probably end up applying to everybody. And so I'm not prepared to do it in gross because I don't know how much notification -- you know, how many instances of notification would be required if I were to make -- if I were to say, okay, it's time to do that.

And the reason I don't know that is that nobody's

told me. In the first instance, it's the plaintiffs' -- it's on the plaintiffs to tell me, I think, "Okay, Judge, we don't necessarily agree with your ruling about what the regulation means, but taking that as a given, we want you to give -- we want you to require the universities to disclose these records which is going to mean requiring giving notice to approximately X number of people."

I don't know what that X is, and I think the plaintiffs need to tell me what that is, and I think the defendants need to tell me what that is.

So what I'm going to say at the moment is that the motion to reconsider is -- in terms of the relief that's being requested is denied without prejudice. And the "without prejudice" means to, some motion that after, you know, appropriate consultation and whatever, basically tells me what -- what the numbers are that I'm dealing with here because I think it's reasonable to expect that, you know, if it's 100 people, it's going to be one thing. If it's 10,000 people, it's going to be another thing.

And one of the things that I have to take into account is, you know, I have to think down the road on what the ultimate burden is going to be later and how many of those people are going to object and how are we going to deal with all of that. So that's the ruling on that.

I don't have time to -- at this point I don't have

time to talk about the other motion that's on the table right now which is the motion to compel and for sanctions as it relates to Georgetown, but I do want to make a couple of comments about it, and I have a couple of questions. And I don't want to hear argument. I just want answers to my questions, and then I'll make a couple of comments.

So hang on one second. Let me just get to my notes here. Pardon me.

So I entered this order back in March that imposed limits on post -- on discovery of matters that occurred after the complaint was filed in this case. And the complaint was filed in this case in January of 2022, and the order was entered in March of 2023.

Did the defendants know at that point that there was this investigation going on by the Department of Justice and the New York Attorney General? Yes or no? March of 2023, did you know that?

MS. MILLER: Yes.

THE COURT: Did anybody tell me that? In conjunction with that ruling that I made, did anybody tell me that?

MS. MILLER: Not that I'm aware of, your Honor.

THE COURT: And that was Ms. Miller that was talking just then?

MS. MILLER: Yes, sir. Apologies.

THE COURT: Okay. Did the plaintiffs know that

that -- as of March of 2023, March 8th when I entered the order, did the plaintiffs know that investigation was going on?

MR. GILBERT: Your Honor, no. This is Robert Gilbert.

THE COURT: Okay. So let me just make a couple of -- and actually, I think I might have one more question. Give me a second.

All right. I want to ask one other question, and it's about a statement that's made in summary in an earlier part of the response brief that's more detail on Page 6:

"Notwithstanding that Georgetown and a number of other defendants determined that the DOJ transcript was not responsive to the March 8th order, in the lead-up both to certain deadlines, Georgetown again considered the Deacon transcript" -- D-e-a-c-o-n transcript -- "and elected to produce it so that plaintiffs had an opportunity to question appropriate witnesses about the substance of the testimony and to avoid later discovery disputes about whether the transcript should have been produced."

So I want to just kind of drill down a little bit on the last part of that, "to avoid later discovery disputes about whether the transcript should have been produced."

What the heck does that mean after you spend most of your brief telling me that it didn't have to be produced?

MS. MILLER: Your Honor, we didn't want to be -- inevitably in a deposition the plaintiffs will ask, "Have you ever been deposed before?" At some point inevitably Mr. Deacon will be deposed. We expect that he would have said, "Yes, I have been deposed." The fact of the deposition would have come out.

We wanted to avoid potential motion practice, the very motion practice we find ourselves in right now as to whether or not it should have been produced. We had hoped to avoid that dis --

THE COURT: Even -- but that's why I focused on the language that you used, "to avoid later discovery disputes about whether the transcripts should have been produced."

I mean, you take this very strident position in your response here that the transcript wasn't required to be produced because I entered an order that specifically covered post-complaint discovery.

So why would there have been a dispute about it if you hadn't produced it?

MS. MILLER: If we hadn't produced it and plaintiffs had find out about it at one of the depositions, I have no doubt that plaintiffs would have filed a motion seeking its production and we would have had the very dispute that we are having right now and now --

THE COURT: Okay. Now I've got another question.

And I'll take an answer on this from any defense counsel who wants to answer, but whoever goes first is the first -- is the person who is going to do it.

Why didn't anybody tell me when you asked me for this sort of limiting post-complaint discovery that there was an investigation going on that already had at that point involved depositions being taken of people on the very same issues involved in this case?

Why did nobody think, "Gee, maybe the judge should know about this when he's being asked to make a ruling about post-complaint discovery"? Why didn't anybody do that? I'll take a volunteer.

MR. ROELLKE: Your Honor, John Roellke for Brown University. I'll just say for Brown, we weren't involved in the investigation, so that's the reason we didn't do it.

THE COURT: Well, then you're not a good person to answer this question, okay, so don't waste my time.

Okay. The record will reflect a really long silence.

This is a no-brainer, folks on the defense side. This is a no-brainer, no-brainer. I should have been told about that. I should have been told that there was a parallel investigation involving -- involving depositions being -- were already ongoing when I was being asked to limit post-complaint discovery.

And I will tell you that it's not -- it should not be

surprising to you that when I read all of this stuff, I figured, yeah, there's a pretty good chance that I wasn't told that on purpose because if I had been told that, you wouldn't have gotten an order that said anything like the one that you said -- that you got here. Of course, those depositions would have been produced. Of course, they would have. Of course, they would have.

So you can stand on the language of an order that I entered in an information vacuum that was created by the defendants. There's lots of words for that. We could call it concealment. We could call it a bunch of other things, but that's -- that's dirty pool as far as I am concerned. It is dirty pool.

Now, does that mean I should be putting people in -- you know, imposing sanctions and stuff like that? I'm not really persuaded of that either at this point, but you have not put yourselves in a good position, the folks who were involved in that investigation that knew about it and didn't think to breathe a word of me or thought not to breathe a word of me which is what I suspect actually happened.

You did not put yourselves in a good position. And, you know, how that colors later rulings, I guess we can all argue about that five years from now, but it's not a good thing.

What I want you to do on that is I want you to

take -- on that motion is to take the -- take the proposal that Georgetown made that's listed in bullet -- it's described, it's summarized at the bottom of Page 3 and the top of Page 4 on some bullet points. Take the issue of sanctions off the table.

Maybe there's somebody -- I'm not averse to making somebody come back and testify more. That part of it, I'm okay with. We're not going to be talking about money, you know, censuring or reprimanding or anything like that beyond what I have already done because I think I just kind of did the reprimand thing. And try to come up with an agreement on what's going to happen in terms of additional production.

I think on the defense side, you have to assume that your person who already got deposed is going to have to sit some more. So that motion is taken under advisement. You're to talk about it more. I want a status report by a week from now that --

MR. GILBERT: Your Honor, this is Robert Gilbert for the plaintiffs.

THE COURT: Hold on. No, you may not. You just interrupted me, so you just lost your right to talk for the rest of the hearing.

I want that report by the 31st of July.

And this is why we're not doing any more phone or video hearings because when a person interrupts me in the

courtroom, that's going to be the last time they talk there too.

So here is the deal from now on. The first of the in-person hearings that I referenced is going to be on the 24th of -- it's going to be on -- hang on a second. I want to make sure I don't blow the date here. It's going to be on the 25th of August -- excuse me. It's going to be on the 24th of August at 1:00 o'clock in the afternoon in person in the courtroom.

Any motions that anybody wants -- there's a status report that's due a week before that which is the 17th of August. This one is only four weeks out. Going forward it will be six weeks, but I have to do it then for a couple of reasons relating to schedule.

Any motions that relate, that anybody wants me to decide are going to need to be filed by 10 days before that, which is the 14th of August which is a Monday, and the responses to any such motions are due on the 21st. There won't be any replies. And if I need to hear argument, I'll hear it at the hearing.

The deal is going to be you have to be there in person to talk. We'll provide a call-in number for people to call in and listen, but it's listen only.

That concludes our hearing today. I've given you an hour and 15 minutes or an hour and 10 minutes, and that's all

I got to give you because I've got people sitting in my courtroom waiting for me.

Take care. Thanks.

(Proceedings adjourned at 10:57 a.m.)

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C E R T I F I C A T E

I, Judith A. Walsh, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable MATTHEW F. KENNELLY, one of the judges of said court, at Chicago, Illinois, on July 24, 2023.

/s/ *Judith A. Walsh, CSR, RDR, F/CRR* July 26, 2023

Official Court Reporter

United States District Court

Northern District of Illinois

Eastern Division